STATE OF MICHIGAN

COURT OF APPEALS

AMANDA MORRILL, ALLEN H. SCHIEFELBEIN, JR., and JOAN ELLEN SCHIEFELBEIN,

Plaintiffs-Appellees/Cross-Appellants,

v

ST. JOSEPH COUNTY ROAD COMMISSION and DENNIS L. KANE, JR.,

Defendants-Cross-Appellees,

and

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, DEPARTMENT OF TRANSPORTATION, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellants/Cross-Appellees,

and

WHITE PIGEON TOWNSHIP, ST. JOSEPH COUNTY DRAIN COMMISSIONER, STATE TREASURER, GEORGE F. FIELD, ALICE C. FIELD, MICHIGAN GAS UTILITIES, GTE NORTH, AMERICAN ELECTRIC POWER, WHITE PIGEON KLINGER LAKE, MICHIGAN CATV, CITIZEN BANK TRUSTEE, JOHN J. HAGNER, JENNIFER BELLOWS HAGNER, a/k/a HAGNER JENNIFER BELLOWS, JAMES R. GERCHOW, JEANNIE L. GERCHOW, U. E. SMITH, SUE B. SMITH, JEAN F. SHANK, CHARLES H. BABER, and MARGARET J. BABER,

UNPUBLISHED
December 11, 2001

No. 217365
St. Joseph Circuit Court
LC No. 96-000943-CH

Defendants.

AMANDA MORRILL, ALLEN H. SCHIEFELBEIN, JR., and JOAN ELLEN SCHIEFELBEIN,

Plaintiffs-Appellees/Cross-Appellants,

v

ST. JOSEPH COUNTY ROAD COMMISSION,

Defendant-Appellant/Cross-Appellee,

and

DENNIS L. KANE, JR.,

Defendant-Cross-Appellee,

and

WHITE PIGEON TOWNSHIP, ST. JOSEPH COUNTY DRAIN COMMISSIONER, DEPARTMENT OF TRANSPORTATION, STATE TREASURER, DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, DEPARTMENT OF NATURAL RESOURCES, GEORGE F. FIELD, ALICE C. FIELD, MICHIGAN GAS UTILITIES, GTE NORTH, AMERICAN ELECTRIC POWER, WHITE PIGEON KLINGER LAKE, MICHIGAN CATV, CITIZEN BANK TRUSTEE, JOHN J. HAGNER, JENNIFER BELLOWS HAGNER, JAMES R. GERCHOW, JEANNIE L. GERCHOW, U. E. SMITH, SUE B. SMITH, JEAN F. SHANK, CHARLES H. BABER, and MARGARET J. BABER,

Defendants.

No. 217420
St. Joseph Circuit Court
LC No. 96-000943-CH

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs filed suit to quiet title to a portion of Stewart Street in Bluff Beach Plat, St. Joseph County, Michigan. The trial court ruled, without the benefit of a trial or hearing, that the portion of Stewart Street at issue was vacated as a public road because it had been abandoned as a public road. In Docket No. 217365, the Department of Consumer and Industry Services, the Department of Transportation, and the Department of Natural Resources (hereafter referred to as the State defendants) appeal as of right, arguing that the trial court improperly declared that the portion of Stewart Street at issue was abandoned and that summary disposition should have been granted in their favor on other grounds. In Docket No. 217420, the St. Joseph County Road Commission (defendant Road Commission) appeals as of right, raising the same arguments as the State defendants. Plaintiffs cross-appeal in both consolidated appeals, arguing that judgment in their favor should alternatively be upheld on other grounds. Plaintiffs also argue that the trial court erred in granting a motion in limine to preclude them from offering evidence at trial regarding the issue whether Stewart Street was ever accepted as a public road. We reverse and remand.

I

Both the State defendants and the defendant Road Commission argue that the trial court violated their due process rights because the trial court determined that the road had been abandoned without conducting a hearing or trial on this issue. Defendants contend that there were legal and factual questions that the trial court did not address because of its actions in sua sponte deciding the issue of abandonment. We agree that the trial court erred.

The trial court disposed of the case at a settlement conference. The attorney for the State defendants was not present at the time of the ruling. When the trial court ruled on the issue of abandonment, it did so without giving notice to any of the parties that it would be deciding the issue. None of the parties were afforded the opportunity to specifically brief the issue of abandonment. At the time the trial court ruled, all the parties were under the impression that a trial was going to be held. While the trial court was in possession of substantial information in the case, including evidence that would support that Stewart Street had been abandoned, defendants had no opportunity to challenge the trial court's authority to decide the matter of abandonment or to present additional evidence that may have been relevant and important to the decision of abandonment.

"When any court contemplates sua sponte summary disposition against a party, that party is entitled to unequivocal notice of the court's intention and a fair chance to prepare a response." *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 90; 492 NW2d 460 (1992) (Corrigan, J., concurring). "A court that fails to afford that constitutionally rooted courtesy [notice and an opportunity to be heard] has no authority to grant summary disposition." *Id.* Here, there was no notice that the issue of abandonment was being considered by the trial court as a matter for summary disposition. The issue of abandonment had not been presented to the trial court previously in any motion and, thus, was not fully briefed or presented before the trial court made its ruling. The trial court erred when it decided the issue of abandonment without affording defendants notice and a right to be heard on that issue. Therefore, remand is necessary for trial, or minimally, for the matter to be properly presented to the trial court and for the parties to be given notice and an opportunity to be heard.

II

Plaintiffs argue that the trial court incorrectly ruled on a motion in limine. We agree and reverse the trial court's ruling.

In 1919, several members of the Howard family, who platted Bluff Beach, filed a petition to vacate a portion of Stewart Street. In the petition, petitioners indicated that Bluff Beach was a town plat made up of lots and public streets. The petitioners noted that the streets were "duly dedicated to the use of the public in 1906." The petition further stated that Bluff Beach was "made up of lots 1 to 81 inclusive and of public streets designated as such on the plat, including Stewart Street." Interestingly, the petitioners did not own lot 6. Nevertheless, they moved to vacate a portion of Stewart Street in favor of the owners of lot 6, the Knowlens. The petition indicated that the lot lines for lot 6 were not properly pointed out or pegged, that the mistakes led to the Knowlens building their cottage on a large part of what was platted as Stewart Street, that the owners of other lots in the plat were only technically interested because they did not need to use Stewart Street to access the lake, and that petitioners and the Knowlens were the only truly interested parties in the petition. The petitioners alleged that vacating the portion of Stewart Street upon which the cottage was built, "and embankments thereof," would leave ample and sufficient street necessary and convenient for public use and access to the lake. The plat maps were attached to the petition. After reviewing the petition, the trial court issued an order in 1919 stating, in relevant part:

> 3. From said petition, the Court further finds that the part of Stewart Street sought to be vacated by this proceeding is part of a public street of the Town Plat of Bluff Beach; that said Bluff Beach is neither an incorporated city or village nor an addition to any incorporated city or village, but is an unincorporated town plat situated in the township of White Pigeon in said County.
>
> 4. That said Statute (Sec. 3354-page 1282 of vol. 1 of Said Comp. Laws of 1915) requires that notice of the pendency of the Petition and of the time of the hearing of the application thereon, be given "by posting up the same in 3 of the most public places in the town, city or village where such lands are situated.
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> * * *
>
> 6. . . . [T]he Court, therefore, finds that said notice was not posted up in 3 of the most public places in the said Township of White Pigeon as required by said Statute.
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> 8. The Court therefore adjudges, decrees and orders; that for want of posting said notice in 3 of the most public places in said township of White Pigeon and for that reason only, the Court has no jurisdiction or authority to proceed to hear said cause upon its merits or to order the vacation prayed at this time.
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> 9. But the Court further adjudges, decrees & orders that said Petition be not dismissed, but, instead, that it stand as a valid, sufficient, properly executed and filed petition under the Statute, and that it stand as a proper & sufficient basis

> for such de-novo proceedings by Petitioners as they may see fit to take in the way of new notice of pendency. . . .

Thereafter, proper notice was given. Subsequently, after noting that there was no opposition to the petition, the trial court issued an order, vacating a portion of Stewart Street. The order provided, in relevant part:

> 8. That said Town Plat of Bluff Beach was duly surveyed, laid out, platted and established as a Town Plat by said name of Bluff Beach and the streets thereof duly dedicated to the use of the public in 1906 by Hugh P. Stewart and William G. Howard (and their wives) . . . a true copy of said Plat of Bluff Beach as recorded being attached to the petition on file in this case . . .
>
> 9. That said Town of Bluff Beach has never been incorporated and is made up of lots 1 to 81 inclusive and of the public streets shown on said Plat . . .
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> * * *
>
> 15. That said Hugh P. Stewarts designation of what he said was the Southwest corner of said lot, was an honest mistake and that the building of said cottage where built, was in good faith reliance upon said Hugh P. Stewarts said designation.
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> * * *
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> 19. That deducting said parcel sought to be vacated, will leave Stewart Street of the width of 20 feet; that said 20 feet will be (as the evidence in the case shows) ample & sufficient for all necessary or convenient public uses and for all convenient access to Klinger Lake.
>
> * * *
>
> The Court therefore adjudges, orders and decrees that so much of that part of said Stewart Street in said Town Plat of Bluff Beach which lies between Lake Street and the margin of Klinger Lake . . .be and the same is hereby vacated and the title thereto shall vest and is hereby vested in said Frederick W. Knowlen & Luella E. Knowlen as husband & wife in entirety . . . free & clear of and from all right, or title which either the Petitioners, or the public or the said County of St. Joseph, has or may have therein by reason of the platting thereof as aforesaid.

Here, an attorney for two defendants, not parties to this appeal, argued a "motion in limine." The attorney claimed that the December 1919 order, vacating part of Stewart Street, precluded plaintiffs from arguing that Stewart Street was not a public street and, thus, plaintiffs should be barred from producing evidence on the issue whether Stewart Street was ever accepted as a public road. The Road Commission and the State defendants joined in the motion. The trial court ruled initially that res judicata did not apply. The trial court later reconsidered the matter and sua sponte invoked the law of the case doctrine to grant the motion in limine. The trial court ruled that the trial court's orders of 1919, finding that certain notice was required and that the

remainder of the road would be sufficient for public use, were tantamount to a decision that the road was public. Therefore, plaintiffs would be precluded from arguing that Stewart Street never became a public road:

> So it's clear in my mind that Judge Chester was presented with a request to abandon the public street. And because there was no posting the Judge said I can't do it, but I'm not going to make the Plaintiffs file any further petitions, just do the proper posting and you can then proceed. And once that proper posting occurred then Judge Collingwood specifically found as pointed out in Mr. Marks' pleading that deducting the parcel sought to be vacated will leave Stewart Street of a width of 20 feet and the said 20 feet will be as the evidence in the case shows ample and sufficient for all necessary and convenient public uses and for all convenient access to Klinger Lake. That was the judgment that was recorded.
>
> Now, I came across a case frankly two days ago or yesterday - - today is Tuesday - - in Lawyer's Weekly and it was the case of King versus the City of Ypsilanti. It's unpublished. It's per curiam, . . . and that case stands for the proposition - - it's different. It's not directly on point, but the issue I think is there where the Plaintiff, the surviving spouse of a fire fighter, claims she was entitled to certain pension benefits, the law of the case doctrine - - they don't say res judicata - - they say the law of the case doctrine prevents us from considering the issue because it was raised and decided in a previous decision. Even though Plaintiff was not a named party in the previous action the specific question raised in this case was necessarily considered and resolved in the prior decision.
>
> Now, if I look at the law of the case doctrine the issue of whether or not Stewart Street was - - the remaining portion of Stewart Street was meant to be public, the judge in 1919 entered a judgment saying once we abandon the part where the Plaintiffs' residence, the remaining portion is public.
>
> And I will come to the legal conclusion, Mr. Guerin, that that is the law of the case, and that would obviate the need as it relates to these parties for the governmental entity to take any further action to formally accept the street.
>
> . . . I will grant your motion in limine. I do it on the basis of the theory that this was the law of this case, the decision in 1919 by the St. Joe County Circuit, that clearly and equivocally spelled out the fact that the remaining portion of Stewart Street was to be used by the public, and I cannot overturn that law that was decided those many years ago.
>
> * * *
>
> So all I'm doing is indicating that the motion in limine is granted. And to the extent that that will change the amount of proofs or the way in which the case will go forward, I guess the lawyers need to confer and determine what we need to do at this point.

We reverse the trial court's ruling, finding that the law of the case doctrine is inapplicable and that the 1919 orders do not operate to preclude litigation on the issue of acceptance.

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. . . . Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. . . . The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided *during the course of a single continuing lawsuit.* [*Ashker v Ford Motor Co,* 245 Mich App 9, 13; 627 NW2d 1 (2001) (emphasis added).]

Clearly, the law of the case doctrine is inapplicable to the present case. In litigation approximately eighty years before the lawsuit in this case, a circuit court judge was called upon to vacate a portion of a street as platted in a plat recorded with the township. An appellate court of this state did not render any opinion on the trial court's rulings in that case and the lawsuit at issue here is not, and can in no way be considered as, a continuation of the 1919 litigation.

Although the law of the case doctrine does not support the trial court's ruling, defendants nevertheless argue that the ruling should be affirmed. They argue that plaintiffs' predecessors in title acknowledged that Stewart Street was a public street when they went to the trial court in 1919 and asked for a formal vacation of a portion of Stewart Street. Defendants also claim that when the trial court in 1919 determined that notice was required, it necessarily determined that Stewart Street was public. Defendants argue that the 1919 proceeding to vacate the road was a statutory, in rem action and, therefore, the ruling that the road was public was binding on plaintiffs and the world. Defendants conclude that the judgment in the in rem proceeding cannot be collaterally challenged.

We disagree with defendants' contention because plaintiffs are not collaterally challenging a 1919 decision that is binding on the issue at hand. The 1919 petition alleged that Stewart Street was *dedicated to public use* in the plat. The November 1919 order indicated that *based on the petition, Stewart Street was part of a public street in the plat* and that, according to the statute under which the petitioners petitioned the court, a certain type of notice was required. That notice was not given and thus, the court could not proceed. The question whether the dedication in the plat was accepted, formally or informally, was not raised in 1919 and the trial court did not have to decide the issue of acceptance as part of its determination with regard to notice. In 1919, the public clearly had an interest in Stewart Street, whether or not it was accepted at the time, because the street had been dedicated for public use in the plat. The trial court's order recognized that because the public had an interest, notice was required. In issuing a final order in the 1919 case, the trial court specifically noted that deducting a portion of Stewart Street from that which was platted would still leave ample street for public use and access to Klinger Lake. It also stated, however, that the vacated portion was to be given to the Knowlens "free & clear of and from all right, or title which either the Petitioners, or the public or the said County of St. Joseph, has or may have therein by reason of the platting thereof as aforesaid." The trial court understood that the public's interest in Stewart Street in 1919 was based on rights it had or may have acquired by way of the platting. Whether the offer of dedication, through the recording of the plat, was properly accepted was not the subject of the 1919 litigation. The trial

court's decision to preclude plaintiffs from litigating the issue of acceptance based on the 1919 order was error. Plaintiffs' action is not a collateral attack on the 1919 judgment or orders.

Further, collateral estoppel does not apply to bar plaintiffs from litigating the issues of informal acceptance, lapse, or withdrawal.

> Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. . . . Collateral estoppel [also] applies only when the basis of the prior judgment can be clearly, definitely and unequivocally ascertained. [*Ditmore v Michalik*, 244 Mich App 569, 577-578; 625 NW2d 462 (2001).]

As with *Ditmore*, the issues in this case, whether the dedicated road was ever accepted or whether the offer lapsed or was withdrawn, were not litigated, decided, or placed in a valid final judgment. The basis of the prior judgment vacating a portion of Stewart Street in 1919 had nothing to do with whether the dedicated road was actually used by the public or formally accepted after it was dedicated. Defendants' argument that the insertion of the word "public" in the orders has particular meaning is speculation at best.

Defendants do not argue that res judicata applies and they do not appeal the trial court's decision that it did not apply to the case. Thus, we need not discuss the issue of res judicata.

On remand, the trial court should not, based on the 1919 orders, preclude plaintiffs from litigating the issue of acceptance.

III

Defendants also argue on appeal and plaintiffs argue on cross-appeal that they were respectively entitled to summary disposition on the issue of acceptance. Defendants contend that the road was either formally or informally accepted and, thus, the trial court did not have authority to vacate it. Plaintiffs argue that the road was never formally or informally accepted and that the offer has either lapsed or been withdrawn. Thus, the trial court had authority to vacate it. The trial court granted summary disposition to plaintiffs on the issue of formal acceptance, finding as a matter of law that there was no formal acceptance. The trial court denied summary disposition to plaintiffs and defendants on the issues of informal acceptance. A trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> [T]he well-established rule is that a valid dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority. . . . Public acceptance must be timely, . . . and must be disclosed through a manifest act by the public authority "either formally confirming or accepting the dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation." . . . [T]he requirement of public

> acceptance by a manifest act, whether formally or informally, was necessary to prevent the public from becoming responsible for land that it did not want or need, and to prevent land from becoming waste property, owned or developed by no one. [*Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996).]

The issue of acceptance is a question for the trier of fact. *Village of Bellaire v Pankop*, 37 Mich App 50, 54-55; 194 NW2d 379 (1971). "If an offer to dedicate platted roads is timely and effectively accepted by the respective township or county, the circuit court has no authority to vacate the roads absent the particular defendant's consent." *Marx v Dep't of Commerce*, 220 Mich App 66, 73-74; 558 NW2d 460 (1996).

The trial court granted summary disposition for plaintiff on the issue of formal acceptance. Reviewing the evidence de novo, it appears that the trial court was correct in ruling that there was no formal acceptance of Stewart Street. Formal acceptance is acceptance by the resolution of a governmental authority. *Marx, supra* at 74, citing *Eyde Bros Development Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 664; 411 NW2d 814 (1987). The certification and approval of the plat itself does not constitute formal acceptance of dedicated property. *Marx, supra* at 77. In this case, there was no evidence that any governmental authority accepted Stewart Street by resolution after the plat was certified and approved. There was evidence only that a McNitt Act resolution was passed in February 1940. The resolution indicated that all streets and highways shown in green on the attached maps were in actual use for public travel. Almost all of the roads on the attached maps were highlighted in green. Neither the depicted roads nor their respective plat or plats were identified. In *Christiansen v Gerrish Twp*, 239 Mich App 380, 389-390; 608 NW2d 83 (2000), this Court addressed whether a general McNitt resolution constitutes formal acceptance:

> In *Kraus v Dep't of Commerce*, *supra* at 427-430, the Supreme Court [indicated] . . . that a McNitt resolution cannot suffice to accept a road if it is a general resolution purporting to take over all dedicated streets in a county, i.e., if it does not specifically identify the road to be accepted. In a footnote, the *Kraus* Court stated:
>
> "*Eyde* also involved a 1953 McNitt resolution that *did* refer to the specific subdivisions that contained the streets at issue. There, the plats were recorded in 1927 and 1944. The panel found that acceptance did not occur until the street was paved in 1962. However, the plaintiffs had done nothing to exclude the public from the platted street until one of them fenced off the unimproved end of it in 1980. Because the defendants would have prevailed whether or not the 1953 resolution was sufficient, we need not decide whether *Eyde* is valid with respect to McNitt resolutions that specified the relevant subdivision or street."
>
> This footnote evidences a wavering by the *Kraus* Court regarding whether a McNitt resolution that specifically identifies the road in question is [even] sufficient evidence of formal acceptance.

In *Kraus, supra* at 430, the Supreme Court held that "a McNitt resolution that did not expressly identify the platted road in dispute or the recorded plat in which that road was dedicated is insufficient to effect manifest acceptance of the offer to dedicate the road to public use."

In this case, the McNitt resolution that was passed did not expressly identify Stewart Street or Bluff Beach Plat. The general resolution was not sufficient under current law to effect manifest acceptance of the offer. Thus, there was no formal acceptance as a matter of law and summary disposition for plaintiff on the issue of formal acceptance was proper.

We further note that defendants' proposition that annual county surveys evidence formal acceptance has no merit. The "mere certification of the road as a public highway" does not affect the road's actual status. *Maghielse v Crawford Co Rd Comm'n,* 47 Mich App 96, 99; 209 NW2d 330 (1973). In *Village of Bellaire, supra* at 55, this Court cited *Missaukee Lakes Land Co v Missaukee Co Rd Comm'n,* 333 Mich 372, 376-378; 53 NW2d 297 (1952), with approval for the proposition that when deciding the issue of acceptance, "[n]o particular importance can be attached to the action of the county road commission in certifying the roads."

With regard to informal acceptance, summary disposition was inappropriate for any party. Acceptance may be informal through the expenditure of public money or informal through public use. *Marx, supra* at 74. We have reviewed the extensive, conflicting evidence with regard to the public use of Stewart Street and agree with the trial court that there is a genuine issue of material fact on the issue of acceptance by public use.

We believe, however, that, as a matter of law, the issue of informal acceptance through expenditure of public funds must be resolved in plaintiffs' favor. Acceptance must be timely, meaning that it must occur before the offer of dedication lapses or before the property owner withdraws the offer. *Marx, supra* at 78-79. In this case, plaintiffs argue both that the offer lapsed and that it was withdrawn before acceptance. In *Marx, supra* at 79, this Court discussed lapse through time:

> As long as a plat proprietor or his successors take no steps to withdraw an offer to dedicate land for public use, the offer is treated as continuing. Whether an offer lapses or continues depends on the circumstances of each case. In *Kraus,* the Court found that a lapse of eighty-six years was unreasonable and held that the offer was no longer valid where there had been no acceptance of the dedicated land. In *Shewchuck v Cheboygan,* 372 Mich 110, 113-114; 125 NW2d 273 (1963), . . . the Supreme Court held that an acceptance eighty-seven years after the dedication was, similarly, unreasonably late, noting that '"after any considerable lapse of time [such an offer] must be regarded as no longer open for acceptance, unless the circumstances are such as to make the offer continuous.'" In contrast, in *Ackerman v Spring Lake Twp,* 12 Mich App 498; 163 NW2d 230 (1968), this Court held that a twenty-six year delay was not unreasonable. *Id.* At 501.
>
> We believe the present sixty-eight-year delay in accepting the dedication is more similar to the situations arising in *Shewchuck* and *Kraus* and, accordingly, conclude that the offer lapsed. Defendant Township has offered no evidence that the offer was meant to continue indefinitely, and we consider three generations to

> be an unreasonable length of time to expect an offer to remain open. Therefore, we conclude that Defendant Township's 1979 resolution accepting all dedicated lands, though sufficient in form, was enacted after the offer in the present case had lapsed. Accordingly, it may not constituted a valid acceptance.

In this case, at best, the evidence shows that the first public expenditures were made in the 1970s for gravel. The plat was dedicated in 1906. The delay of almost seventy years confirms plaintiffs' position that the offer lapsed before there was any informal acceptance by virtue of the fact that public funds were spent. See *Marx, supra* at 79.

Finally, there is a question of fact with regard to whether MCL 560.255b applies to bar litigation on the question of acceptance. The statute provides:

> (1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.
>
> (2) The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:
>
> (a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.
>
> (b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located . . .

This statute became effective December 22, 1978.

Plaintiffs argue that there is more than adequate evidence that the dedication either lapsed or was withdrawn before the effective date of MCL 560.225b. Defendants argue to the contrary. There are questions of fact with regard to the issue of withdrawal. In *Marx, supra* at 80-81, this Court discussed withdrawal of an offer to dedicate land for public use:

> [W]e also find that the offer was withdrawn. The withdrawal of an offer differs from the lapse of an offer in that the former requires an affirmative act, while the latter stems from inaction. An offer is withdrawn when the proprietors use the property in a manner inconsistent with public ownership. What qualifies as inconsistent use will depend on the circumstances of each case, and acquiescence by one of the parties to the other party's use of the property will often be pivotal. Examples of inconsistent use have included the erection of buildings and fences and the planting of trees. In *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511; 446 NW2d 161 (1989), the Supreme Court held that a property owner's occupancy of a dedicated alley by erecting a wooden and wire fence and by planting the area with large trees and underbrush for forty years was inconsistent with public rights.

> Plaintiffs have offered evidence that they built a driveway on Birch Lane in 1970. They also have offered evidence that the road commission acquiesced by informing plaintiffs that the township had no intent to develop the road. Defendants have not refuted this evidence. Although plaintiffs have not actually blocked access across Birch Lane, as was done in *Vivian, supra* at 520, we find that a driveway traversing the disputed property is inconsistent with public use of Birch Lane. By building the driveway and regularly parking cars there, plaintiffs have clearly evinced an intent to regard the parcel as their own property. There is no material issue of fact that defendant Bay Township did not make timely acceptance of the offer of dedication. The trial court properly granted the order of vacation.

In this case, plaintiffs argue that they took many actions inconsistent with the public ownership of Stewart Street. Amanda Morrill averred that the property was in the Morrill family from 1937 and that they placed a private driveway on the street and maintained it since that time. Joseph Chrystler averred that he visited the Morrills' property over approximately fifty years and that what appeared to be platted as Stewart Street was never used as anything more than an unimproved private driveway. The Morrills also used part of what is supposed to be Stewart Street as a yard. Further, the Morrills planted two evergreens in middle of Stewart Street in the late 1950s and planted decorative planters to block the roadway in 1996. Plaintiffs and defendant Dennis L. Kane, Jr. used the street as private access to their property. Plaintiffs also presented evidence, through a 1985 letter, that the Road Commission specifically claimed that it would not oppose action to vacate Stewart Street and that it could not envision taking an active interest in the road at any time given the nature of the road, i.e., its steepness and erosion issues.

On the other hand, defendants argued that the plaintiffs' driveway did not interfere with public use and that no cars were regularly parked in the traveled portion of Stewart Street. Kane testified that plaintiffs did not regularly park cars on Stewart Street. He also testified that he used Stewart Street to access his property. Defendants pointed out that plaintiffs took no steps to block off access completely until 1996.

The issue of withdrawal should be decided on remand along with the other issues of acceptance or abandonment.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell